

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VELERIE K. CARTER)	
Claimant)	
)	
VS.)	
)	
AIR CAPITOL DELIVERY & WAREHOUSE, LLC)	
Respondent)	Docket No. 1,023,021
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

VELERIE K. CARTER)	
Claimant)	
)	
VS.)	
)	
KSQ BLOWMOLDING ENGINEERING, INC.)	
Respondent)	Docket No. 1,023,117
)	
AND)	
)	
LIBERTY INSURANCE CORP.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the above-captioned February 18, 2009, Awards entered by Administrative Law Judge John D. Clark. The Board heard oral argument on June 19, 2009. Thomas M. Warner, Jr., of Wichita, Kansas, appeared for claimant. Douglas D. Johnson, of Wichita, Kansas, appeared for respondent Air Capitol Delivery &

Warehouse, LLC and its insurance carrier (Air Capitol). Michael D. Streit, of Wichita, Kansas, appeared for respondent KSQ Blowmolding Engineering, Inc., and its insurance carrier (KSQ).

In Docket No. 1,023,021, the Administrative Law Judge (ALJ) found that claimant's work-related injuries to her neck were temporary in nature and adopted the opinion of Dr. Anthony Pollock that she had no permanent impairment. Therefore, the ALJ found that claimant was only entitled to temporary total disability benefits and medical expenses previously paid by Air Capitol.

In Docket No. 1,023,117, the ALJ found that claimant sustained an accidental injury that arose out of and in the course of her employment with KSQ on April 8, 2005. The ALJ adopted the opinion of the court-ordered independent medical examiner, Dr. Paul Stein, and concluded that claimant did not sustain any additional permanent impairment of function to her neck as a result of the April 8, 2005, injury. He found, however, that claimant had an 8.5 percent permanent partial impairment to her right upper extremity at the level of the shoulder, which was a split between the impairment ratings of Dr. James Gluck and Dr. George Fluter. As such, claimant was limited to a scheduled injury and was not entitled to a work disability award.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's findings that she was not entitled to a permanent partial disability to her neck. Further, claimant argues that she is entitled to a work disability.

Air Capitol argues that there is no evidence that the injury suffered by claimant while employed at Air Capitol resulted in any permanent impairment of function, nor was there any evidence as to when, where or how the degenerative changes in claimant's neck came about. Accordingly, Air Capitol requests the Award of the ALJ in Docket No. 1,023,021 be affirmed.

KSQ argues that claimant did not suffer a compensable injury while working at KSQ. In the alternative, KSQ argues that claimant only suffered an injury to her right shoulder and requests that the Board find Dr. Gluck's rating of 7 percent permanent partial impairment to the right upper extremity is the most credible. KSQ argues that claimant did not suffer an injury to the neck on April 8, 2005, and contends that any increase in symptoms was the natural and probable consequence of her earlier injury at Air Capitol. KSQ asserts that claimant is not entitled to a work disability. However, if the Board finds that claimant has a work disability, KSQ requests that work disability benefits be

discontinued as of September 2007 because it was then claimant began earning more than 90 percent of her preinjury average weekly wage (AWW).

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of her employment on April 8, 2005, while working at KSQ?

(2) Does claimant have permanent impairment to her neck? If so, was the impairment caused by her injury of February 6, 2004, or was it caused or aggravated by her alleged injury of April 8, 2005?

(3) What is the nature and extent of claimant's impairment?

(4) Is claimant entitled to a work disability? If so, for what periods of time was she earning less than 90 percent of her preinjury AWW?

FINDINGS OF FACT

In 2004, claimant was working for Air Capitol driving a semi-tractor/trailer. She injured her neck on February 6, 2004, while pulling a king pin out of a trailer. Claimant was treated by Dr. Anthony Pollock. On March 5, 2004, claimant had an MRI of her cervical spine that showed mild disc protrusions at C4-5 and C5-6 with no evidence of pressure on the anterior surface of the cord and no evidence of direct nerve root pressure or neuroforaminal encroachment. Dr. Pollock treated claimant conservatively and found her to be at maximum medical improvement on August 26, 2004. He released her to return to work at full duty with no restrictions, and he concluded she had no permanent impairment. In a letter of September 29, 2004, to Air Capitol's insurance carrier, Dr. Pollock indicated that claimant may need additional treatment in the form of anti-inflammatory medication and that she had been provided with a TENS unit.

In February 2005, claimant terminated her position with Air Capitol and began working for KSQ, performing the duties of a shag driver. She said she hooked and unhooked trailers and moved them from one building to another. She described this job as heavy, saying she would remove the king pin, lift the trailer, put the landing gear down, and open doors. Shortly after being hired by KSQ, several KSQ employees were laid off, and claimant was given the job of operating a forklift as well as driving a truck.

On April 8, 2005, while claimant was operating a forklift, she turned her head to her right and felt a sharp pain on the right side of her neck that went down the back of her right arm underneath her armpit to her elbow. She reported the injury to KSQ and was sent to an in-house physical therapist and later to Dr. John Winblad for treatment to her right shoulder and arm. Dr. Winblad gave claimant a 20-pound lifting restriction as well as

restrictions of no pushing, pulling, or lifting, and no turning or putting her neck in an awkward position. KSQ accommodated those restrictions.

Dr. Paul Stein, a board certified neurosurgeon, saw claimant on August 25, 2005, at the request of the ALJ for an independent medical examination to provide an opinion regarding treatment recommendations. He recommended an MRI scan of claimant's cervical spine, an MRI arthrogram of her shoulder, and an EMG/NCT of the cervical paraspinal muscles and both upper extremities. Dr. Stein said the EMG and nerve conduction test was reported to be normal except for a mild degree of left carpal tunnel syndrome, which he did not believe was related to this matter. The MRI of claimant's right shoulder indicated a partial thickness tear of the supraspinatus tendon and a suspicion of a labral tear and possible rotator cuff tear. He recommended that claimant be referred to an orthopedic surgeon regarding her right shoulder problems. The MRI scan of the cervical spine showed minimal disc bulging at C5-6 but did not show any impingement on the nerve roots. Dr. Stein did not recommend any treatment to claimant's cervical spine.

Claimant was ultimately referred to Dr. James Gluck, a board certified orthopedic surgeon, for treatment of her right shoulder. He first saw her on May 11, 2006, and performed right shoulder arthroscopic surgery with acromioplasty on May 19, 2006. On August 31, 2006, claimant told Dr. Gluck that the constant pain in her right shoulder had resolved, but she had some mild discomfort and decreased strength in her right shoulder. Dr. Gluck released her from treatment but indicated that she could not perform the essential duties of her job, such as climbing into the truck cab or pulling. Using the *AMA Guides*,¹ Dr. Gluck rated her as having a 7 percent permanent partial impairment to her right upper extremity. Dr. Gluck was not authorized to and did not treat claimant's neck.

Dr. Stein saw claimant again on May 10, 2007, at the request of KSQ. After reviewing the medical records, he said that claimant's 2004 MRI reported mid-line disc protrusions at C4-5 and C5-6 and the 2005 MRI showed bulging discs, so either her neck improved or the doctor who read the 2004 MRI "overreported"² her condition. He found no substantial structural change in her neck since 2004.

Upon examination, Dr. Stein found that claimant had mild but persistent neck tenderness and a mild decrease in cervical range of motion. There were no structural changes on imaging studies to suggest anatomic or pathologic aggravation. He said it was possible she suffered a mild permanent but only symptomatic aggravation of her cervical degenerative disk disease and soft tissue strain on April 8, 2005.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Stein Depo. at 14.

Although claimant was complaining of more discomfort in her neck, Dr. Stein did not find that she had any additional permanent impairment of function as a result of the April 8, 2005, incident. Nevertheless, Dr. Stein opined that based on the *AMA Guides*, claimant had an impairment of function somewhere between DRE cervicothoracic Category 1 (0% impairment) and Category II (5% impairment), perhaps just barely in Category II. He did not assign any permanent work restrictions as it related to her neck and said, therefore, that she would have no task loss. He did not review a list of past job tasks claimant had performed.

Dr. George Flutter, who is board certified in physical medicine and rehabilitation, examined claimant on January 17, 2007, at the request of claimant's attorney. Claimant told him that on April 8, 2005, she turned her neck while operating a forklift, after which she suffered pain in her neck and right arm and headaches. Her arm symptoms got worse until she was unable to lift her arm, and she eventually had arthroscopic surgery in May 2006.

Dr. Flutter reviewed claimant's diagnostic testing, noting that her cervical MRI scan of September 28, 2005, showed a minimal posterior disk bulge at C5-6 without a significant neural foraminal or spinal stenosis. He also noted that the MRI performed March 5, 2004, showed mild midline protrusions of the C5-6 and C4-5 disks. Dr. Flutter agreed that both claimant's MRIs showed that claimant had mild or minimal findings structurally, and there was no real difference between the MRI findings of March 2004 and the findings of September 2005 from the standpoint of structural status. Dr. Flutter also said that a patient who has a shoulder injury can sometimes have pain in the cervical region because there are a lot of soft tissue structures, particularly muscles, that originate at the neck that help suspend the shoulder girdle onto the body. Dr. Flutter said he did not think claimant's injury of April 8, 2005, was specifically an aggravation of her 2004 neck injury but was, instead, a separate event. He said at least by claimant's report, her symptoms had improved and resolved after her 2004 injury. He also noted that she was not given a permanent impairment rating for the 2004 injury.

Dr. Flutter diagnosed claimant with right shoulder pain status post right shoulder arthroscopy and right-sided neck and upper back pain. He believed her headaches were caused by tension in the muscles of the neck. He opined that there was a relationship between claimant's injury of April 8, 2005, and her symptoms.

Using the *AMA Guides*, Dr. Flutter rated claimant as being in DRE cervicothoracic Category II and that she, therefore, had a 5 percent permanent partial impairment to her whole body. He based his rating on his physical findings of tenderness consistent with a myofascial-type pain. He also rated her right shoulder impairment at 10 percent to the right upper extremity, which converted to 6 percent of the whole body. He also rated her as having a 5 percent permanent partial impairment to the left upper extremity for carpal tunnel syndrome, which converted to 3 percent of the body as a whole. By combining her body as a whole impairments, he opined that she had a total permanent partial impairment of 14 percent. Dr. Flutter did not give claimant a rating for her headaches. Also, he said

he did not know whether claimant was making a claim for left carpal tunnel syndrome but rated it because it was an impairment present at the time he examined her.

Dr. Flutter believed that claimant should have permanent restrictions of lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently; and she should avoid holding her head and neck in awkward or extreme positions. Also, she should restrict activities at or above shoulder level using the right arm to an occasional basis; repetitive grasping using the left wrist to an occasional basis; use of power/vibratory tools using the left hand to an occasional basis, and provide appropriate thermal protection for the hands when working in cold environments. Dr. Flutter reviewed a task list prepared by Karen Terrill. Of the 42 tasks on that list, Dr. Flutter opined that claimant was unable to perform 30 for a 71.4 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the

³ K.S.A. 2008 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁶ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁷ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁸

ANALYSIS

Based upon the opinions of Drs. Pollock and Flutter, the ALJ concluded that claimant suffered no permanent impairment from her February 6, 2004, accident. The Board agrees. Claimant was symptom free when she left her employment with Air Capitol up until the accident on April 8, 2005, while working for KSQ. The ALJ's Award in Docket No. 1,023,021 is affirmed.

When claimant went to work for KSQ, she was asymptomatic and had no restrictions from her injury at Air Capitol. As a result of the April 8, 2005, accident, claimant suffered right shoulder, neck and upper back pain, as well as headaches and range of motion deficits in her neck and shoulders. Claimant was given temporary work restrictions. Dr. Flutter described the April 8, 2005, incident as a new accident and not an aggravation of the February 6, 2004, injury. Dr. Gluck performed surgery on claimant's right shoulder and eventually released her with permanent restrictions for the shoulder. Dr. Stein opined that the EMG and nerve conduction studies were negative for cervical radiculopathy. This was consistent with his opinion that the cervical MRIs showed no impingement on the nerve roots. He did not recommend any treatment for the cervical spine. He made no diagnosis of injury to claimant's back and said the carpal tunnel syndrome was not related to claimant's accident. He attributed claimant's cervical range of motion limitations to muscular or soft tissue strain. He also said claimant's degenerative disc disease was unchanged in the 2005 MRI from the 2004 MRI. He found no structural change and no rateable permanent impairment of function as a result of the April 8, 2005, accident. Furthermore, he said claimant did not require any permanent work restrictions. Dr. Stein's

⁵ *Id.* at 278.

⁶ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁷ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁸ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

opinions vary little from Dr. Fluter's with respect to diagnosis but do contrast with the opinions of Dr. Fluter with respect to permanent impairment, restrictions and whether claimant's upper back, neck and carpal tunnel syndrome conditions are related to the April 8, 2005, accident. Dr. Fluter believes they are related, whereas, except for some soft tissue neck strain, Dr. Stein does not. Dr. Stein's 5 percent rating to the cervical spine is for claimant's degenerative disc disease and not for her soft tissue injury. He does not relate this impairment rating to either accident or trauma. Instead, Dr. Stein described the images from the 2005 MRI scan as part of the natural aging process. Dr. Fluter acknowledged that it was not unusual for an injury to a shoulder girdle to cause symptoms in the neck as well.

In Docket No. 1,023,117, the ALJ determined that claimant's work-related permanent impairment was limited to her shoulder. This conclusion is consistent with the opinion of his court-appointed independent medical examiner, Dr. Stein. The Board agrees with the ALJ's conclusions in this regard. As for the percentage of impairment for the shoulder, the Board likewise adopts the ALJ's findings and conclusions. The ALJ's award of an 8.5 percent permanent partial impairment to the right upper extremity at the level of the shoulder is affirmed.

CONCLUSION

(1) Claimant suffered personal injury by accident on April 8, 2005, that arose out of and in the course of her employment with KSQ.

(2) Claimant does not have a rateable impairment of function to her neck or cervical spine that is attributable to either her February 6, 2004, accident or her April 8, 2005, accident.

(3) Claimant has an 8.5 percent permanent impairment to her right shoulder in Docket No. 1,023,117.

(4) As claimant's permanent impairment is a scheduled injury under K.S.A. 44-510d rather than a general body disability under K.S.A. 44-510e, she is not entitled to an award of work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Awards of Administrative Law Judge John D. Clark, dated February 18, 2009, are affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent Air Capitol and its Insurance Carrier
Michael D. Streit, Attorney for Respondent KSQ and its Insurance Carrier
John D. Clark, Administrative Law Judge